No. 91-207

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IN THE

Supreme Court of the United States

October Term, 1991

MOHAMMAD ABBAS HASHIM,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Second Circuit erred in holding that the Equal Access to Justice Act is inapplicable to adversary adjudications conducted before the Immigration and Naturalization Service?

LIST OF PARTIES

Petitioner is Mohammad Abbas Hashim.

Respondent is the Immigration and Naturalization Service.

TABLE OF CONTENTS

	PAGE
Question Presented For Review	i
List of Parties	ii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Statement of the Case	5
Proceedings Below	5
Reasons for Granting the Writ	7
I. This Court Has Already Granted Certiorari In A Case Which Presents Questions Identical To Those Addressed By This Petition	7
II. The Decision Of The United States Court Of Appeals For The Second Circuit Holding That The Equal Access To Justice Act Is Inapplicable To Immigration Proceedings Disregards Both The Fundamental Purpose Of EAJA, And Its Legislative History	8

PAGE

III. Interpretting An Adversary Adjudication Under The EAJA As Including Immigration Proceedings Is Consistent With Established Rules Of Statutory Construction 12

IV. The Second Circuit Misconstrues The Importance Of Marcello v. Bonds 13

V. Public Policy Dictates That The EAJA Be Applied To Immigration Deportation Proceedings 17

Conclusion 18

Appendix 1a

TABLE OF AUTHORITIES

Cases PAGE

Ardestani v. United States Dep't of Justice,
904 F.2d 1505 (11th Cir.), *reh'g denied*,
915 F.2d 698 (11th Cir. 1990), *cert. granted*,
111 S.Ct. 1101 (1991) 7, 8

Blum v. Stenson, 465 U.S. 886 (1984) 9

California v. Hamilton, 476 U.S. 1301 (1986) 7

Escobar-Ruiz v. INS, 838 F.2d 1020
(9th Cir. 1988) (en banc) 9, 11, 13, 17

Gotkin v. Miller, 379 F. Supp. 859
(E.D.N.Y. 1974), *aff'd*, 514 F.2d 125
(2d Cir. 1975) 13

Haire v. United States, 869 F.2d 531
(9th Cir. 1989) 12

Hashim v. INS, 1991 U.S. App. LEXIS 13267
(June 25, 1991) 2

Helvering v. Hallock, 309 U.S. 106 (1940) 16

In re Providence Television Ltd. Partnership,
75 Bankr. 139 (Bankr. N.D. Ill. 1987) 12

Israel-British Bank (London) Ltd. v. FDIC,
536 F.2d 509 (2d Cir.), *cert. denied*,
429 U.S. 978 (1976) 13

Keney v. New York, 388 U.S. 440 (1967) 7

Cases PAGE

Marcello v. Bonds, 349 U.S. 302, *reh'g denied*, 350 U.S. 856 (1955) 13, 15, 16

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1983) . . 12

Payne v. Tennessee, 51 S. Ct. Bull. (CCH) B3576 (June 27, 1991) 16

Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) . . . 10

Sullivan v. Hudson, 490 U.S. 877 (1989) 11

United States v. American Trucking Ass'n, 310 U.S. 534, *reh'g denied*, 311 U.S. 724 (1940) . . . 9

United States ex. rel. Frisch v. Miller, 181 F.2d 360 (5th Cir. 1950) 15

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 14, 15, 17

Statutes

5 U.S.C. § 504 . . . . . *Passim*

5 U.S.C. § 554 . . . . . *Passim*

8 U.S.C. § 1101 *et seq.* 5, 15

8 U.S.C. § 1105(a)(b) 7

8 U.S.C. § 1226(a) 4, 10

8 U.S.C. § 1252 *et seq.* 5

PAGE

Miscellaneous

46 Fed. Reg. 32,901 (1981) 10

H.R. Conf. Rep. No. 1418, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984 11

H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003 . . . . . 9, 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Mohammad Abbas Hashim respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 25, 1991 which denied a petition to review the Board of Immigration Appeals' June 14, 1990 decision in the above-entitled proceeding.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Second Circuit in *Hashim v. INS*, 1991 U.S. App. LEXIS 13267 (June 25, 1991) is set forth in Appendix A hereto at A-1.*

The unreported opinion of the Board of Immigration Appeals dismissing the appeal from the decision of the Immigration Judge dated June 14, 1990 is set forth in Appendix B hereto at A-13.

The unreported decision of the Immigration Judge denying petitioner's motion for attorney's fees dated June 23, 1989 is set forth in Appendix C hereto at A-24.

JURISDICTION

An application for attorney's fees was made to the immigration judge under federal statutory law, 5 U.S.C. § 504. The application was denied on jurisdictional grounds. Subsequently, the Board of Immigration Appeals ("BIA") dismissed petitioner's appeal. Petitioner sought direct review in the Second Circuit Court of Appeals, which denied the petition to review the BIA's decision.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Second Circuit is invoked under 28 U.S.C. § 1254(1).

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* "A__" refers to pages in the Appendix.

STATUTES INVOLVED

5 U.S.C. § 504. *Cost and fees of parties*

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

* * * *

(b)(1) For the purposes of this section--. . .

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise. . . .

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication. . . .

5 U.S.C. § 554. *Adjudications*

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved --

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

8 U.S.C. § 1226. *Exclusion of aliens--Proceedings*

(a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.

STATEMENT OF THE CASE

Petitioner was a crewman aboard a vessel known as the Al-Mutanabbi which arrived in the New York area on or about December 22, 1988. While the ship was anchored in New York harbor, petitioner jumped ship and boarded a refueling barge which lay alongside the Al-Mutanabbi. He remained on that vessel, free from restraint for a number of hours. There were no U.S. officials present nor was he near any immigration check-point. Some time later, the Coast Guard boarded the barge, summoned Immigration and Naturalization Service ("INS") officials and petitioner was taken into custody.

Notwitstanding his readily apparent "entry" into the United States, petitioner was placed into exclusion proceedings. Concurrent with the INS's placement of petitioner into exclusion proceedings, a memorandum was prepared by a general attorney for the INS. Based upon the facts of petitioner's case, and the applicable law, that memorandum recommended that petitioner be placed in deportation, rather than exclusion, proceedings on the ground that petitioner had made an "entry" into the United States. Despite this written recommendation from counsel, the INS pursued exclusion proceedings. Petitioner was detained and denied release on bond by the District Director of the INS.

Proceedings Below

On April 21, 1989, together with his filing of an application for Asylum under Section 208 of the Immigration and Nationality Act (as amended by the Refugee Act of 1980) ("INA"), 8 U.S.C. § 1101 *et seq.*, petitioner moved by Notice of Motion and Supporting Affidavit to terminate the pending exclusion proceedings on the ground that he had entered the United States and was thus subject to deportation, pursuant to 8 U.S.C. § 1252 *et seq.*, rather than exclusion.

The U.S. Government opposed the motion to terminate the exclusion proceedings. The INS cross-examined petitioner at the hearing on the motion. Immediately thereafter, the Immigration Judge granted the motion. No oral argument was deemed necessary. The government waived appeal.

Subsequent to the termination of the exclusion proceedings, petitioner submitted a motion to the Immigration Court for attorney's fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. The motion was denied by the Immigration Judge, on June 23, 1989, on the sole ground that "the Immigration Judge does not have jurisdiction to consider such an application." A-24.

Petitioner filed an appeal with the Board of Immigration Appeals ("BIA") on June 26, 1989.[1] In a Decision and Order dated June 14, 1990, the BIA dismissed Petitioner's appeal of the Immigration Judge's decision concluding that an immigration judge does not have the authority to consider an application for attorney's fees under the EAJA. A-22.

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[1] Simultaneously with the appeal to the BIA, petitioner commenced an action in the Southern District of New York seeking a declaratory judgment that he was entitled to attorney's fees under the EAJA. The district court issued an opinion on July 26, 1990 denying petitioner attorney's fees under the EAJA in connection with his exclusion proceedings. *Hashim v. INS*, No. 89 Civ. 4471 (KTD) (S.D.N.Y. July 27, 1990), 1990 U.S. Dist. LEXIS 9391 (Genfed library, Currnt file). A judgment dismissing the complaint in accordance with the district court's opinion was entered on July 30, 1990.

Petitioner appealed the district court's decision to the United States Court of Appeals for the Second Circuit. By Stipulation and Order dated October 4, 1990, the district court's decision was vacated, and the appeal therefrom was withdrawn. *Hashim v. INS*, No. 90-6240 (2d Cir. Oct. 17, 1990).

Thereafter, pursuant to 8 U.S.C. § 1105(a)(b), petitioner sought review of the BIA's denial of his EAJA claim in the United States Court of Appeals for the Second Circuit. In its June 25, 1991 decision, the Second Circuit denied the petition for review and affirmed the decision of the BIA. The court held that an award of attorney's fees in connection with exclusion or deportation proceedings was not authorized by EAJA.

REASONS FOR GRANTING THE WRIT

POINT I

THIS COURT HAS ALREADY GRANTED CERTIORARI IN A CASE WHICH PRESENTS QUESTIONS IDENTICAL TO THOSE ADDRESSED BY THIS PETITION

The importance of the issue being presented to the Court is evidenced by this Court's grant of certiorari to a judgment of the Court of Appeals for the Eleventh Circuit which addresses a question identical to the one posed by this case. *See Ardestani v. United States Dep't of Justice*, 904 F.2d 1505 (11th Cir.), *reh'g denied*, 915 F.2d 698 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (1991). The question presented by *Ardestani*, as well as by the instant case, is whether the Equal Access to Justice Act ("EAJA") is applicable to adversary proceedings conducted before an immigration judge. At minimum, consideration of the instant petition should be postponed (or briefing on the Writ delayed) until after *Ardestani* has been decided since the outcome in that case is directly determinative of the result in this case. *See, e.g., California v. Hamilton*, 476 U.S. 1301 (1986)(decision on whether to grant certiorari was withheld pending outcome of case addressing substantially identical issues); *Keney v. New York*, 388 U.S. 440

(1967)(petition was held almost two and a half years until decisions in two other cases raising similar issues were decided).

Alternatively, this Court may grant the petition and join these two cases for purposes of review.

POINT II

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HOLDING THAT THE EQUAL ACCESS TO JUSTICE ACT IS INAPPLICABLE TO IMMIGRATION PROCEEDINGS DISREGARDS BOTH THE FUNDAMENTAL PURPOSE OF EAJA, AND ITS LEGISLATIVE HISTORY

The United States Congress enacted EAJA in 1980. The effect of EAJA, an attorneys' fees shifting statute, is two-fold. First, it modifies the American rule that each party to a litigation bears its own costs, and second, it creates a waiver of the common law doctrine of sovereign immunity.

EAJA authorizes an award of attorney's fees in an "adversary adjudication," where the position of the agency was not substantially justified. 5 U.S.C. § 504(a)(1). The statute defines "adversary adjudication" as "an adjudication under section 554 of this title in which the United States is represented by counsel or otherwise. . . ." *Id.* § 504(b)(1)(C)(i).

An adversary adjudication "defined under" Section 554 is an adjudication "required by statute to be determined on the record after an opportunity for an agency hearing. . . ." 5 U.S.C. § 554(a) (Supp. 1990); *see also Ardestani*, 904 F.2d at 1515 (Pittman, J., dissenting).

Respondent argued below that "under Section 554" should be defined as "required by," "in accordance with," or "subject to the authority or bidding of." Although this rigid construction of "under Section 554" is inconsistent with EAJA's legislative history, and has been rejected by an en banc panel of the Ninth Circuit (*see Escobar-Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (en banc)), it was adopted by the Second Circuit. The Second Circuit held that "under Section 554" means "governed by or in accordance with Section 554."

When statutory language is unclear, as it is here, the legislative history and purpose of the statute should be invoked in order to ascertain the correct meaning of the statute. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 896 (1984). Even when the words of a statute are not ambiguous (as the court below seemingly found), the legislative history should be invoked when the language of the statute conflicts with its intended policy. *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44, *reh'g denied*, 311 U.S. 724 (1940).

EAJA's legislative history indicates that the phrase "under Section 554" was employed for definitional purposes only. The House Conference Report used the reference to Section 554 in Section 504 in precisely that manner. The Report stated that the statute "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedure Act ["APA"] where the agency takes a position through representation by counsel or otherwise." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003, 5012 (emphasis added).

This language makes clear that Congress was concerned with the substantive characteristics of the proceedings, not merely with proceedings that are technically "under" the APA, for determining EAJA's applicability. This conclusion is confirmed by the recommendations of the Administrative Conference of

the United States ("ACUS"). ACUS, which drafted model rules for administrative agencies to use when implementing EAJA, stated that "considering the purpose of the [EAJA], questions of its coverage should turn on substance -- the fact that a party has endured the burden and expense of a formal hearing -- rather than technicalities." 46 Fed. Reg. 32,901 (1981).

Clearly, EAJA's applicability should hinge on whether the proceeding is an adversarial adjudication with attendant formalities or a non-adversarial administrative proceeding; only the latter is beyond the scope of EAJA. Accordingly, "an adjudication under section 554" means any adjudication as defined in section 554 of the APA.

In the APA, "adjudication" is defined by the requirement that there "be [a determination] on the record after opportunity for an agency hearing. . . ." 5 U.S.C. § 554(a). The exclusion proceedings erroneously instituted by the government in this case were plenary proceedings required by statute before "[a] special inquiry officer . . . . [in which a] complete record of the proceedings and of all testimony and evidence produced at such inquiry [was] kept." 8 U.S.C. § 1226(a) (1970).

As the court noted in *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989):

> Plenary exclusion proceedings under § 236 are conducted before an Immigration Judge (IJ), who is an officer of the Justice Department but independant of the INS 8 C.F.R. Part 3. The alien has the right to be represented by counsel and must be so appraised. 8 C.F.R.§ 236.2(a). The proceedings are on the record, and the alien has the right to have them open to the public and the press. *Id.* He has

> the opportunity to present evidence and cross-examine witnesses. 8 U.S.C. § 1226; 8 C.F.R. § 236.2(a).

Id. at 507-08.

The exclusion proceedings conducted herein are precisely the type of adversary adjudication Congress intended to be covered by the EAJA.

EAJA Was Enacted to Increase Accessibility to Justice

In enacting EAJA, Congress intended to ensure that private parties would not be deterred from contesting government action because the expense involved in securing an adjudication of their rights was prohibitive. *See* H.R. Conf. Rep. No. 1418, 96th Cong. 2nd Sess. 5-6, *reprinted in* 1980 U.S. Code Cong. & Admin News 4984.

Various portions of EAJA's legislative history clearly indicate that for purposes of determining the appropriateness of an EAJA award, Congress was not concerned with the legal authority under which a hearing was held, but rather with its substantive character. *See e.g. Escobar-Ruiz*, 838 F.2d at 1023.

This Court has held that EAJA should be broadly read to allow attorney's fees when services are performed in administrative proceedings that are adversarial in nature under the Social Security Act. *Sullivan v. Hudson*, 490 U.S. 877, (1989). In its expansive reading of EAJA, this Court specifically focused on the purpose of the act and stated, "[w]e must endeavor to interpret the fee statute in light of the statutory provisions it was designed to effectuate", *Id.* at 889, provisions which were intended "to diminish the deterrent effect of seeking review of, or defending against, governmental

action. . . ." *Id.* at 890. The remedial sweep of this fee-shifting statute should therefore never be derogated by a "hypertechnical interpretation." *Haire v. United States*, 869 F.2d 531, 534 (9th Cir. 1989) (*quoting Escobar-Ruiz*, 838 F.2d at 1028).

POINT III

INTERPRETING AN ADVERSARIAL ADJUDICATION UNDER THE EAJA AS INCLUDING IMMIGRATION PROCEEDINGS THAT ARE ADVERSARIAL IN NATURE IS CONSISTENT WITH ESTABLISHED RULES OF STATUTORY CONSTRUCTION

In framing the EAJA statute, Congress deliberately excluded six types of proceedings from its effect. *See* 5 U.S.C. § 554(a) (1982). Those proceedings include (1) matters subject to a subsequent trial *de novo*; (2) the selection or tenure of an employee; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) matters involving military or foreign affairs functions; (5) cases in which the agency is acting as an agent for a court; and (6) the certification of worker representatives. *Id.* Hearings and proceedings conducted before an immigration judge or in connection with an immigration matter are clearly not among the enumerated exceptions.

The common rule of statutory construction is that where Congress knows how to say something, is aware of a matter and chooses not to address that matter, its silence is controlling. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984); *In re Providence Television Ltd. Partnership*, 75 Bankr. 139, 140 (Bankr. N.D. Ill. 1987). Likewise, "where words of exception are used, they are to be strictly construed to limit the

exception." *Israel-British Bank (London) Ltd. v. FDIC*, 536 F.2d 509, 513 (2d Cir.), *cert. denied*, 429 U.S. 978 (1976).

Where, as here, Congress has specifically made EAJA inapplicable to certain types of cases, all other types of cases not specifically excluded by the terms of the statute should be included. *See, e.g., Gotkin v. Miller*, 379 F. Supp. 859, 865 (E.D.N.Y. 1974), *aff'd*, 514 F.2d 125 (2d Cir. 1975).

In contrast with the Second Circuit's holding that Congress' intent to bar an award of attorneys' fees in the INA was given effect by Section 292's parenthetical qualification of an alien's right to counsel, the Ninth Circuit in *Escobar-Ruiz* observed that Section 292's parenthetical phrase "was designed to deal with the relationship between indigency and the right to counsel," not to provide, or preclude, fee-shifting when the government's position is untenable. *Escobar-Ruiz*, 838 F.2d at 1028. *See also* H.R. Rep. No. 1434, 96th Cong., 2d Sess. 21, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003, 5010. The Ninth Circuit has concluded that EAJA neither conflicts with nor repeals any portion of Section 292. "The two statutes simply address different issues." *Escobar-Ruiz*, 838 F.2d at 1027. There is nothing in EAJA (or in the INA) which precludes the application of EAJA to immigration proceedings. On the contrary, its application to immigration proceedings comports with the rules of statutory construction.

POINT IV

THE SECOND CIRCUIT MISCONSTRUES THE IMPORTANCE OF MARCELLO V. BONDS

In *Marcello v. Bonds*, 349 U.S. 302 (1955), *reh'g denied*, 350 U.S. 856 (1955), the Supreme Court held that deportation proceedings were not governed by the APA. The Second Circuit relied heavily on this case, decided more than thirty-five

years ago and more than twenty years before EAJA was enacted, to find EAJA inapplicable to exclusion proceedings.

In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 51-53 (1950), the Supreme Court specifically extended the APA's reach to deportation proceedings. In that case Justice Jackson, writing for the majority of the Court, announced that "[i]t is the plain duty of the courts, regardless of their views of the wisdom or policy of the [APA], to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns." *Wong Yang Sung*, 339 U.S. at 45.[2] Applying this broad policy to the issue of deportation hearings, Justice Jackson continued:

> The Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions. But that the safeguards it did set up were intended to ameliorate the evils from the commingling of functions as exemplified here is beyond doubt. And this commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceeding, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused. Nothing in the nature of the parties or proceedings suggests that we should strain to exempt deportation proceedings from reforms in administrative procedure applicable generally to federal agencies.

Id. at 46.

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[2] It is similarly the plain duty of the courts to construe EAJA to eliminate, so far as its text permits, the practices it condemns.

Despite its potential for broader application in immigration proceedings, some courts strictly interpreted the decision in *Wong Yang Sung* to govern deportation proceedings, but not exclusion hearings. *See, e.g., United States ex. rel. Frisch v. Miller*, 181 F.2d 360 (5th Cir. 1950). Moreover, Congress, in a rider to the Supplementary Appropriations Act of 1951, 64 Stat. 1048, negated the effect of *Wong Yang Sung* by specifically exempting deportation and exclusion hearings from the provisions of Sections 5, 7, and 8 of the APA. Thus, until the passage of the INA in 1952, 8 U.S.C. § 1101 *et seq.*, it was clear that the procedural requirements of the APA did not govern deportation and exclusion hearings.

With the passage of the INA in 1952, the Supplementary Appropriations Act rider was explicitly repealed. And, while Congress did not specifically incorporate the holding of *Wong Yang Sung* with respect to deportation hearings, it also did not specifically exempt deportation and exclusion proceedings from the APA as it had done previously in the Supplementary Appropriations Act of 1951. Instead, Congress established procedures which mirrored, in part, the analogous provisions of the APA. It was the one difference between the two however, that led to the Supreme Court holding in *Marcello*, 349 U.S. at 306-10.[3] That difference no longer exists.

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[3] *Marcello* was not without dissent. Justice Black, who was joined by Justice Frankfurter, reviewed the legislative history of the 1952 Immigration Act and argued that the APA should be applicable to deportation proceedings. Justice Black maintained that the APA provisions continued to apply unless an express exclusion of the APA was made in the subsequent legislation; no such exclusion was found to exist in the 1952 Immigration Act. To the contrary, the legislative history of the Immigration Act of 1952 disclosed that the APA did, in fact, apply to the administration of that Act. Specifically, Justice Black noted that House members voting for the bill had been assured

(continued...)

In *Marcello*, the Court noted that because the APA served as the model for § 242(b) of the INA, there was a virtual identity between it and the formal adjudication of sections 554, 556 and 557 of the APA. *Marcello*, 349 U.S. at 307-08. The Court held, however, that by virtue of its unique provision for the co-identity of the Immigration Judge and adjudicative officer, the INA's hearing procedures superseded those contained in the APA. However, as the separate functions requirement of the APA has been adopted in immigration proceedings, the basic distinction drawn by the Court in *Marcello* has become a non-issue.

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[3](...continued)
that "the decision of the Supreme Court in the *Sung* case will be the law of the land when this code is adopted." *Marcello*, 349 U.S. at 318 (quoting 98 Cong. Rec. 4416). Quite clearly, the *Sung* case held that the APA did apply to deportation cases. This court should adopt the analysis provided by dissenting Justice Black.

> As this Court has recently affirmed: "[s]tare decisis is not an inexorable command; rather it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 51 S. Ct. Bull. (CCH) B3576, B3579 (June 27, 1991)(Rehnquist, C.J.)(*quoting Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). Justice Souter, in concurrence, stated: "[w]hen this Court has confronted a wrongly decided, unworkable precedent calling for some further action by this Court, we have chosen not to compound the original error, but to overrule the precedent." *Id.* at B3613 (Souter, J., concurring). The Court's recent pronouncements in *Payne* evince that this Court is not bound by even a narrow interpretation of the holding in *Marcello*.

POINT V

PUBLIC POLICY DICTATES THAT EAJA BE APPLIED TO IMMIGRATION DEPORTATION PROCEEDINGS

The public interest is served by holding all federal administrative agencies accountable for a fair and reasonable application of the law relevant to the exercise of the agencies' statutory authority.

The individuals who are subject to deportation proceedings have "concrete interests at stake." *Escobar-Ruiz*, 838 F.2d at 1026. Yet, deportation proceedings are "difficult for aliens to fully comprehend, let alone conduct" without the assistance of counsel because of the inevitable language and cultural barriers which exist. *Wang Yang Sung*, 339 U.S. at 46. Without the possibility of counsel, aliens are likely to be discouraged from vindicating their rights against unreasonable government action. Such a state of affairs would allow immigration policies to remain unchallenged because of the expense of litigation and thereby subvert a primary goal of EAJA: to encourage private parties to challenge unreasonable government actions, actions that would remain unchallenged unless the opportunity to receive attorney's fees is provided.

Accordingly, public policy mandates that EAJA be applied to immigration proceedings that are adversarial in nature.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision of the Court of Appeals for the Second Circuit which denied petitioner's application for attorney's fees under EAJA.

Dated: New York, New York
July 16, 1991

Respectfully submitted,

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Stephanie Goldstein, a second year law student, assisted in the preparation of this petition.

APPENDIX

Appendix A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 856—August Term, 1990

(Argued: January 10, 1991 Decided: June 25, 1991)

Docket No. 90-4125

MOHAMMAD ABBAS HASHIM,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

WINTER and ALTIMARI, *Circuit Judges*, and WEXLER, *District Judge*.*

Petition for review of a decision of the Board of Immigration Appeals denying a petition for costs and attorneys' fees in connection with exclusion and deportation proceedings. We deny the petition.

* The Hon. Leonard D. Wexler, United States District Judge for the Eastern District of New York, sitting by designation.

LAWRENCE M. SANDS, New York, New York (Fried, Frank, Harris, Shriver & Jacobson, New York, New York, of counsel), *for Petitioner.*

DIOGENES P. KEKATOS, New York, New York (Otto G. Obermaier, United States Attorney for the Southern District of New York, New York, New York, of counsel), *for Respondent.*

Arthur C. Helton, New York, New York (Lawyers' Committee for Human Rights, New York, New York, Michael W. Galligan, Debevoise & Plimpton, New York, New York, of counsel), *for Amicus Curiae Lawyers' Committee for Human Rights.*

WINTER, *Circuit Judge*:

This case arises on a petition for review of a decision of the Board of Immigration Appeals ("BIA") denying an award of costs and attorneys' fees sought under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 (1988) and 28 U.S.C. § 2412 (1988), to a party that had prevailed in an exclusion proceeding conducted under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252 (1988).[1] We deny the petition for review. The

1 Exclusion proceedings are conducted when an alien seeking admission to the United States is not "clearly and beyond doubt entitled to land" to determine whether the alien "shall be allowed to enter or shall be excluded and deported." 8 U.S.C. §§ 1225-26 (1988). When an alien has already made entry into the United States, deportation, rather than exclusion, proceedings are conducted. *See, e.g., Application of Phelisna*, 551 F. Supp. 960, 962 (E.D.N.Y. 1982).

Appendix A

EAJA is facially inapplicable to deportation actions, and its legislative history does not suggest that Congress intended otherwise.

BACKGROUND

Mohammad Abbas Hashim is an Iraqi national who, on December 23, 1988, jumped from a ship docked in New York harbor, the *Al-Mutanabbi*, onto a refueling barge and requested assistance in entering the United States. The barge operator turned Hashim over to the United States Coast Guard who then turned him over to the Immigration and Naturalization Service ("INS"). On December 27, 1988, Hashim filed an application for asylum, which was denied. On April 21, 1989, exclusion proceedings were commenced before Immigration Judge Howard I. Cohen. On June 8, 1989, the immigration judge granted Hashim's motion to terminate exclusion proceedings on the ground that he had already entered the United States and was subject only to deportation proceedings. *See supra* Note 1. The INS accepted Immigration Judge Cohen's determination and waived appeal.

After termination of the exclusion proceedings, Hashim moved for an award of attorneys' fees under the EAJA. Relying on the BIA's decision in *Matter of Fede*, Interim Decision No. 3106 (BIA May 11, 1989), the immigration judge held that the EAJA did not allow reimbursement for attorneys' fees in connection with exclusion proceedings and denied Hashim's application for such an award. On June 26, 1989, Hashim appealed to the BIA, which upheld the denial of fees. Hashim then filed the instant petition for review under 8 U.S.C. § 1105a(a) (1988).

Appendix A

DISCUSSION

Whether the EAJA authorizes an award of attorneys' fees in exclusion or deportation proceedings has been the subject of numerous decisions in various circuits and requires no extended discussion by us. "The starting point in statutory interpretation is 'the language [of the statute] itself,' " *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Watt v. Alaska*, 451 U.S. 259, 265 (1981); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), and " ' "the legislative purpose is expressed by the ordinary meaning of the words used" ' " in the statute. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (quoting *American Tobacco Co. v. Patterson*, 456 U.S. at 68 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962))); *accord United States v. Locke*, 471 U.S. 84, 93 (1985). Ordinarily, statutory language is conclusive absent clear legislative intent to the contrary. *American Tobacco Co. v. Patterson*, 456 U.S. at 68 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *accord INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). Only " ' "rare and exceptional circumstances" ' " justify departure from plain statutory language. *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930))).

On its face, the EAJA seems inapplicable to exclusion or deportation proceedings. In pertinent part, it authorizes the award of attorneys' fees in an "adversary adjudication," 5 U.S.C. § 504(a)(1), which is defined as "an adjudication under section 554 of this title," *id.*

§ 504(b)(1)(C)(i), in which the position of the United States is represented by counsel or otherwise. 5 U.S.C. § 504(b)(1)(C).[2] A common-sense, straightforward reading of this language suggests that "under section 554" means governed by or in accordance with Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554 (1988).

Deportation proceedings, however, are not governed by Section 554 of the APA. The attorney general is authorized by Sections 236 and 242 of the INA to promulgate the "sole and exclusive procedure" for determining the admissibility or deportability of persons under those sections. 8 U.S.C. §§ 1226(a), 1252(b) (1988). Moreover, the Attorney General has promulgated regulations to implement the EAJA, 28 C.F.R. §§ 24.101-.309 (1990), that do

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2 The EAJA states in pertinent part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1).

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1988). Both sections direct the court to award fees and expenses to a prevailing party in an adversary adjudication by administrative agencies as authorized by 5 U.S.C § 504(b)(1)(C).

not include immigration proceedings determining excludability or deportability.

That Congress deliberately exempted exclusion or deportation proceedings from the APA cannot be disputed. After the Supreme Court had extended the APA's reach to deportation proceedings, *see Wong Yang Sung v. McGrath*, 339 U.S. 33, 51-53 (1950), Congress enacted Section 242 to nullify the Court's decision. *See* 3 C. Gordon and S. Mailman, *Immigration Law and Procedure* § 5.7a at 5-79 & nn.4-8 (rev. ed. 1990); *see also* Supplemental Appropriation Act, 1951, Pub. L. No. 81-843, 1950 U.S. Code Cong. & Admin. News 1038, 1042. Subsequently, the Court explicitly held that the APA does not apply to deportation proceedings in *Marcello v. Bonds*, 349 U.S. 302, *reh. denied*, 350 U.S. 856 (1955). Although *Marcello* noted that the provisions for hearings under the APA and the INA were identical in many respects because the APA served as a model for the INA, *id.* at 307-08, the Court held that Section 242 of the INA created a procedure outside the APA specifically tailored to deportation proceedings. *Marcello* thus stated:

> [I]t is clear that Congress was setting up a specialized administrative procedure applicable to deportation hearings, drawing liberally on the analogous provisions of the Administrative Procedure Act and adapting them to particular needs of the deportation process. The same legislators, Senator McCarran and Congressman Walter, sponsored both the Administrative Procedure Act and the Immigration Act, and the framework of the latter indicates clearly that the Administrative Procedure Act was being used as a model. But it was intended only as a model, and when in this very particularized adaptation there was a departure from the Administrative Procedure

> Act—based on novel features in the deportation process—surely it was the intention of the Congress to have the deviation apply and not the general model.

349 U.S. at 308-09; *accord Ho Chong Tsao v. INS*, 538 F.2d 667, 669 (5th Cir. 1976) (per curiam) (APA not applicable to BIA's review of immigration judge's refusal to revoke order deporting alien), *cert. denied*, 430 U.S. 906 (1977); *Cisternas-Estay v. INS*, 531 F.2d 155, 158-59 (3d Cir.), *cert. denied*, 429 U.S. 853 (1976).[3]

Every court, save one, that has addressed the issue, has followed this straightforward analysis. *Hodge v. U.S. Dept. of Justice*, 929 F.2d 153, 155-58 (5th Cir. 1991); *Full Gospel Portland Church v. Thornburgh*, 927 F.2d 628, 630 (D.C. Cir. 1991) (per curiam); *Ardestani v. United States Dept. of Justice*, 904 F.2d 1505, 1515, *reh. en banc denied*, 915 F.2d 698 (11th Cir. 1990), *cert. granted* 111 S. Ct. 1101 (1991); *Clarke v. INS*, 904 F.2d 172, 178 (3d Cir. 1990); *Owens v. Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988); *see also Smedberg Machine & Tool, Inc. v. Donovan*, 730 F.2d 1089, 1092-93 (7th Cir. 1984) (per curiam) (rejecting expansive reading of "adjudication under section 554" clause of 5 U.S.C. § 504(b)(1)(C)(i)).

In *Escobar Ruiz v. INS*, 838 F.2d 1020, 1025 (9th Cir. 1988) (en banc), however, the Ninth Circuit found the

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3 We did suggest in *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983), a habeas corpus proceeding, that an alien might recover attorneys' fees under the EAJA as a prevailing party against the INS in a civil action. We noted that Congress has defined "civil action" broadly, specifically exempting "cases sounding in tort," and "including proceedings for judicial review of agency action." See 28 U.S.C. § 2412(d)(1)(A). We did not address, however, the applicability of the EAJA to exclusion or deportation proceedings. *Oguachuba*, therefore, in no way forecloses the present ruling.

phrase "under section 554" to be ambiguous and to mean either "governed by" or "defined by." *Id.* at 1023. Believing these phrases to connote very different meanings, the *Escobar Ruiz* court then looked to the EAJA's legislative history and noted that the House Conference Report accompanying the original EAJA had described an "adversary adjudication as an agency adjudication defined under the [APA] where the agency takes a position through representation by counsel or otherwise." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003, 5012 (quoted in *Escobar Ruiz v. INS*, 838 F.2d at 1023). Because the APA defines "adjudication" as that which is "required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 554(a), the Ninth Circuit concluded that it had to examine "the procedures by which deportation hearings are actually conducted, rather than determin[e] whether such hearings are technically governed by the APA." *Escobar Ruiz v. INS*, 838 F.2d at 1023. Noting also that Congress contemplated that the EAJA would apply to certain Social Security proceedings not governed by the APA, the Ninth Circuit held that exclusion and deportation proceedings are "adversary adjudications" within the meaning of the EAJA. *See id.* at 1022-27.

We agree with the weight of authority. First, we do not find the statute to be ambiguous. Second, we believe that if Congress intended to have the applicability of the EAJA turn on the general characteristics of various proceedings, it would have described those characteristics in the EAJA rather than seek to accomplish that end by a confusing reference to the APA. Third, the legislative history cited in *Escobar Ruiz* seems little more than an ambiguous snippet. Finally, although the Ninth Circuit

was correct in asserting that the legislative history indicates that Social Security proceedings in which the government is represented by counsel are covered by the EAJA, *id.* at 1026-27, the legislative history of the EAJA relating to Social Security proceedings is simply not on point. The Ninth Circuit conceded in *Escobar Ruiz* that it is unclear whether Social Security proceedings are governed by the APA. *Id.* at 1026; *see also Richardson v. Perales*, 402 U.S. 389 (1971). If such proceedings are governed by the APA, then the EAJA applies by force of its very language. The applicability of the APA to Social Security proceedings has never been authoritatively resolved, however, and may remain forever in doubt, because "Social Security administrative procedure does not vary from that prescribed by the APA." *Richardson*, 402 U.S. at 409.

Moreover, Congress has amended the EAJA explicitly to include certain previously uncovered administrative actions but has failed to include deportation proceedings. *See* H.R. Rep. No. 120, pt. I, 99th Cong., 1st Sess. 10, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132. In 1985, Congress expanded the definition of "adversary adjudication" to include any appeal of a decision made under Section 6 of the Contract Disputes Act of 1978, an amendment intended to overrule the Federal Circuit's holding in *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983), that the EAJA was inapplicable to these decisions. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 1(c)(2)(B) (extending application of the term "adversary adjudication" in 5 U.S.C. § 504(b)(1)(C)); *see also* H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 15 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 144. In 1986, Congress amended the EAJA to include

hearings conducted under chapter 38 of title 31, Administrative Remedies and False Claims and Statements. Pub. L. No. 99-509, § 6103(c) (additional extension of application of term "adversary adjudication" in 5 U.S.C. § 504(b)(1)(C)).

These amendments are instructive. First, Congress has not thought it necessary to pass such an amendment regarding Social Security proceedings. That failure may well reflect Congress's belief that the APA, and thus the EAJA, applies to such proceedings. Second, by reenacting and amending the EAJA without altering its applicability to immigration proceedings, Congress appears to have ratified the Attorney General's regulations implementing the EAJA which do not include exclusion or deportation proceedings. 28 C.F.R. §§ 24.102(b), 24.103(a) (1990). *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *Trichilo v. Secretary of Health and Human Services*, 823 F.2d 703, 706 (2d Cir. 1987). Even if an inference of ratification seems a reach, the failure to amend the EAJA to include such proceedings adds to the legislative record reflecting Congress's intent to exclude them.

Finally, Congress's continued retention of Section 292 of the INA which provides that "[i]n any exclusion or deportation proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government)," despite subsequent amendments and the enactment of the EAJA, demonstrates Congress's intent that the government not be liable for attorneys' fees in deportation and exclusion proceedings. 8 U.S.C. § 1362 (1988).

We thus agree with the Third Circuit that, although awarding attorneys' fees in exclusion hearings may advance the purposes underlying the EAJA, it is the "province of Congress, not the courts, to rewrite the statute to include proceedings that are not clearly within its scope." *Clarke v. INS*, 904 F.2d at 178.

The petition is denied.

Appendix B

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A29 065 949 - New York Date: June 14 1990

In re: MOHAMMAD ABBAS HASHIM

IN DEPORTATION PROCEEDINGS APPEAL

ON BEHALF OF RESPONDENT:
Lawrence M. Sands, Esquire

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
One New York Plaza
New York, New York 10004

ON BEHALF OF SERVICE:
Peter Moran, General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered without inspection

APPLICATION: Asylum, withholding of deportation, or voluntary departure

In a decision dated August 4, 1989, an immigration judge found the respondent deportable as charged; denied an

application from the respondent for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and, in the alternative, for withholding of deportation under section 243(h) of the Act, 8 U.S.C. § 1253(h); and granted him the privilege of voluntary departure in lieu of deportation. The respondent has appealed. A request the respondent has made for oral argument before this Board is denied as a matter of discretion. *See* 8 C.F.R. § 3.1(e). The appeal will be dismissed.

The record before us in this case also contains a decision dated June 23, 1989, in which the immigration judge denied a motion from the respondent for attorney fees under the Equal Access to Justice Act, 5 U.S.C., § 504 ("EAJA"). The respondent filed a separate appeal from that decision. This appeal also will be dismissed.

The respondent is a 24-year-old native and citizen of Iraq. On June 9, 1989, an Order to Show Cause was issued in which it is alleged that the respondent entered the United States on December 23, 1988, without inspection, and, therefore, that he is deportable under section 241(a)(2) of the Act, 8 U.S.C., § 1251(a)(2). At a deportation hearing before the immigration judge on August 1, 1989, the respondent admitted the allegations in the Order to Show Cause and conceded that he is deportable as charged (Tr. at 2-3). We are satisfied that the respondent's deportability has been established by evidence which is clear, unequivocal, and convincing.

The immigration judge designated Iraq as the place of deportation, and the respondent applied for asylum under section 208 of the Act, and, in the alternative, for withholding of deportation under section 243(h) of the Act.

Appendix B

The applicant bears the evidentiary burdens of proof and persuasion in any application for withholding of deportation under section 243(h) of the Act or asylum under section 208 of the Act. 8 C.F.R. § 208.5.

To establish eligibility for withholding of deportation under section 243(h) of the Act, an alien's facts must show a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. *INS* v. *Stevic*, 467 U.S. 407 (1984). This means that the alien's facts must establish that it is more likely than not that he would be subject to persecution for one of the grounds specified. *Id.*

To establish eligibility for asylum under section 208 of the Act, an alien must meet the definition of a "refugee," which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); section 208 of the Act. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987). An applicant for asylum has established a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution on the basis of one of the 5 grounds specified in the Act. *Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987). We note further that asylum, unlike withholding of deportation, may be denied in the exercise of discretion to an alien who establishes statutory eligibility for the relief. *INS* v. *Cardoza-Fonseca*, *supra*; *Matter of Mogharrabi*, *supra*.

Appendix B

Pursuant to the requirements of 8 C.F.R. § 208.10(b), the respondent's asylum application was sent to the Department of State, Bureau of Human Rights and Humanitarian Affairs ("BHRHA") for an advisory opinion. In a letter dated June 5, 1989, the director of the BHRHA expressed an opinion which includes the following statement:

> Notwithstanding the foregoing, we have considered the applicant's account of the alleged mistreatment at the hands of the Basrah police in June 1988. Assuming that the facts are correct as stated, we believe that it would be reasonable to come to the opinion that event rose to the level of persecution because of the applicant's perceived political opinion. We do not believe the subsequent renewal of his seaman's papers, in July one month later, necessarily erodes the plausibility of his account. Two different parts of the Iraqi government are involved here, and it is quite possible that the maritime office which renewed his papers was unaware of the encounter with the Basrah police.

On the other hand, with regard to an alleged fear of future persecution arising out of a message from the Iraqi government to return the respondent to Iraq, the director made the following statement:

> We know of no way by which it could be determined whether the telex received by the ship's master was indeed a genuine order for the applicant to report for military service or merely a pretext to get him back to Iraq to answer to political charges. We tend to believe that the order may have been genuine since the police did have the applicant in custody a few months before and probably would not have released him after only two days had he been viewed as a real security problem (as the regime would see it).

Appendix B

The respondent came to the United States as a crewman on an Iraqi ship. He had been a crewman since 1983, when he completed a 6-month seaman's course at the Gulf Arabic School and received a seaman's certificate. On the basis of that certificate, he obtained a seaman's "book" from the Iraqi government which entitled him to travel outside of Iraq, and he was exempted from military service for 10 years (Tr. at 38). The exemption, however, could be revoked at any time (Tr. at 38).

According to his testimony, he did not have any problems with the Iraqi government until he participated in a demonstration in November of 1986. He was one of approximately 50 people who wanted an end to the war that was raging at that time between Iraq and Iran. In addition to being opposed to the war, they wanted the Iraqi government to stop sending children to the front lines of the battle, and they were upset about the use of chemical warfare by both countries. They met twice over the course of a week to plan the demonstration. The demonstration started late in the afternoon in the city of Basrah. While they were calling upon people not to fight in the war, Iraqi intelligence agents shot at 2 of the demonstrators. In response, the demonstrators threw rocks at the intelligence agents which precipitated more shooting by the intelligence agents and soldiers that were with them. A large number of demonstrators were killed or wounded, but the respondent managed to escape by running away.

Participation in the demonstration was a very serious offense against the Iraqi government. At the beginning of the war with Iran, the government had passed a law which provided a death penalty for anyone who criticizes or trespasses on the government during the war (Tr. at 91). Although he had not been arrested at the demonstration, the government knew that

he had participated in the demonstration. A person he knew visited some of the injured demonstrators and learned that they had given a list of participants to the Iraqi government which included the respondent's name (Tr. at 44 and 96). This resulted in a warrant for his arrest (Tr. at 44). Consequently, he moved to a different county fearing for his life (Tr. at 76).

The respondent concluded that he will be killed for participating in the demonstration if he returns to Iraq (Tr. at 96).

Participation in the demonstration is not the only basis for the respondent's asylum application. He also described an incident which allegedly occurred in June of 1988. According to his testimony in this regard, he continued to protest the war by using spray paint to write political graffiti on a wall. He wrote a political statement on the wall and watched as a friend wrote a second political statement on the wall. One of the statements called for peace and the other called for overthrowing the government. While he was watching his friend put the second statement on the wall, government agents appeared. They arrested his friend and began beating him. The respondent tried unsuccessfully to intervene on behalf of his friend and was arrested too. They were taken to a prison and interrogated individually. After the respondent was interrogated, he was released. A week later, however, the respondent was arrested again. This time, he was held for 24 hours and beaten. The explanation for this treatment was that the respondent's friend had told the authorities that the respondent had participated in writing political slogans on the wall. The respondent did not believe that his friend had said that to the authorities.

Appendix B

The respondent wanted to go to the United States to escape persecution at the hands of the Iraqi government, so he became a crewman on a ship with ports of call in this country. He found it difficult, however, to get away from other crewmen when he first arrived in the United States. He believed that 2 of the crewmen were Iraqi secret service agents. Finally, on December 20, 1988, the ship received a telex from the Iraqi government instructing the respondent to return for military service (Tr. at 37). He did not believe that the government wanted him for military service. He had received a 10-year exemption from military service in 1983, as a seaman, and the war was over. Consequently, he concluded that the real reason for wanting him to return was to punish him for his political activities, and he jumped ship (Tr. at 37-39).

The respondent submitted an 8-page affidavit with his asylum application. A substantial amount of time was spent at the hearing questioning him about inconsistencies between his testimony and the statements he had made in the affidavit. For instance, he testified that he had been arrested twice in June of 1988, once when he and his friend were putting graffiti on a wall and a second time a week later. In the affidavit, however, he only mentioned the second arrest. The respondent's explanation for this discrepancy was that he had not classified the first incident as an arrest because he was not beaten up that time (Tr. at 28). Another example is that his claim about being arrested on account of writing political graffiti on a wall was not mentioned in the affidavit. Further, he testified that his participation in the demonstration in November of 1986 was known to the Iraqi government, and this belief is not mentioned in his affidavit.

The record also contains a copy of the asylum application he submitted to the district director on December 27, 1988,

6 months before deportation proceedings were instituted. His persecution claim then was based on an alleged fear that he would be punished by the company he had worked for because he had jumped ship. With regard to the Iraqi government, he stated that, "Our family is very loyal to the government and they treated me nice."

The immigration judge was disturbed by the inconsistencies in the record. He observed that the respondent had changed his story and added information each time he had made a persecution claim. The claims in the initial asylum application, the second asylum application, and his testimony at the hearing were very different. The immigration judge also doubted the respondent's allegation that the Iraqi government knew about his alleged participation in the 1986 demonstrations. He found it difficult to understand why the respondent would be released after only 24 hours when he was allegedly arrested in June of 1988, if he was wanted for participating in that demonstration. The immigration judge placed emphasis also on the fact that the strongest allegations in support of the persecution claims were left out of the affidavit submitted with the second asylum application. He could not understand why the respondent would not have provided this information to his attorney when the affidavit was prepared. The immigration judge concluded that the respondent's factual statements were not credible. He believed that the respondent might face difficulties in Iraq for jumping ship or for failing to respond to the order to report for military duty, but he did not consider the consequences of these acts to be persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Accordingly, the immigration judge denied the asylum application on the ground that the respondent had failed to establish eligibility for asylum under section 208 of the Act or for withholding of deportation under section 243(h) of the Act.

Appendix B

On appeal, the respondent contends that his uncontradicted affidavit and oral testimony at the hearing were ample evidence of persecution by Iraqi officials. He notes in this regard that an alien's own statements may in some cases be the only evidence available, and it can suffice where, as in this case, it is believable and sufficiently detailed to provide a plausible and coherent account of the basis for the persecution claim. *Matter of Mogharrabi, supra.* According to the respondent, the immigration judge's adverse credibility findings are not supported by substantial evidence. The respondent argues that some of the inconsistencies relied upon by the immigration judge were trivial and the others were explained adequately.

In determining whether an asylum applicant has met his burden of proof, we have recognized the difficulties that may be faced by aliens in obtaining documentary or other corroborative evidence to support their claims of persecution. Consequently, in *Matter of Mogharrabi, supra*, we held that the lack of such evidence will not necessarily be fatal to an application. We noted, as have various courts of appeals, that an alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his alleged fear. This does not mean, however, that corroborative evidence is never necessary. For instance, in some cases background evidence may be needed to evaluate the credibility of an asylum applicant's testimony. *Matter of Dass*, Interim Decision 3122 (BIA 1989).

In the present case, we are not persuaded that the uncorroborated statements of the respondent are sufficient. They are not believable or consistent. The immigration judge found the respondent's statements to be lacking in credibility. The findings of an immigration judge with respect to the

credibility of witnesses appearing before him ordinarily will be given great weight. *Matter of Magana*, 17 I&N Dec. 111 (BIA 1979); *Matter of Teng*, 15 I&N Dec. 516 (BIA 1975); *Matter of T-*, 7 I&N Dec. 417 (BIA 1957). Moreover, we agree with his findings on the basis of our own review of the record. The respondent has attempted to account for the discrepancies between his first asylum application, the affidavit submitted with his second asylum application, and his testimony at the hearing. His attempts, however, are not persuasive. For instance, when asked why he had only mentioned one arrest in the affidavit, he claimed that he did not classify the first incident as an arrest because he was not beaten that time. This is an uncommon way to classify arrests. Furthermore, his claim is contradicted by the fact that he considered the first incident an arrest when he testified at the hearing. In any event, there are simply too many discrepancies in the record to consider the respondent's statements credible.

We find that the respondent has failed to meet his burden of establishing the truth of the factual allegations which are the basis for his persecution claims. Consequently, we conclude that he has failed to establish eligibility for asylum under section 208 of the Act or for withholding of deportation under section 243(h) of the Act. *See Matter of Mogharrabi, supra.*

Finally, we find no merit in the respondent's appeal from the immigration judge's decision on the application for attorney fees under EAJA. We agree with the immigration judge that he did not have authority to consider that application. *Matter of Fede*, Interim Decision 3106 (BIA 1989). This appeal, therefore, also will be dismissed.

Appendix B

Accordingly, the following orders will be entered.

ORDER: The respondent's appeals are dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ JAMES P. MORRIS

FOR THE BOARD

Appendix C

Decision of Immigration Judge on Motion For Attorney Fees Under EAJA
A29-065-949

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
201 VARICK ST. - S.P.C.
NEW YORK, NEW YORK 10014

June 23, 1989

In the matter of
MOHAMMAD ABBAS HASHIM, Respondent

On Behalf of Respondent	On Behalf of Service
Lawrence M. Sands, Esq.	Peter Moran, Esq.
Fried, Frank, Harris, Shriver & Jacobson	General Attorney
One New York Plaza	201 Varick - S.P.C.
New York, New York. 10004	New York, New York. 10014

The respondent's attorney has moved for attorney fees under the Equal Access to Justice Act. As pointed out in the Service's reply memorandum, the Immigration Judge does not have jurisdiction to consider such an application. See *Matter of Fede* int Dec. 3106 (BIA 5-11-89).

IT IS ORDERED that the motion be and the same is hereby denied.

/s/ HOWARD I. COHEN

Howard I. Cohen
Immigration Judge

(2)

No. 91-207

Supreme Court, U.S.
FILED
AUG 19 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

MOHAMMAD ABBAS HASHIM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412(d), authorizes the award of attorney's fees for work performed in connection with administrative deportation proceedings conducted by the Immigration and Naturalization Service.

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-207

MOHAMMAD ABBAS HASHIM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 936 F.2d 711. The opinion of the Board of Immigration Appeals (Pet. App. 13a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1991. The petition for a writ of certiorari was filed on July 22, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner prevailed in an administrative deportation proceeding and thereafter sought an award of attorney's fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504 and 28 U.S.C. 2412(d), for

his attorney's work in those proceedings. An immigration judge denied fees (Pet. App. 24a), and the Board of Immigration Appeals affirmed (Pet. App. 13a-23a).

On petitioner's appeal, the court of appeals affirmed, holding that EAJA does not apply to administrative deportation proceedings. Pet. App. 1a-11a. The court noted that "[e]very court, save one, that has addressed the issue" has rejected petitioner's position, and stated its agreement with the majority view (*id.* at 7a-8a).[1]

ARGUMENT

Petitioner correctly observes (Pet. 7) that the issue presented in this petition is the same as the one before the Court in *Ardestani* v. *INS*, cert. granted, No. 90-1141 (Mar. 4, 1991). *Ardestani* has been fully briefed in this Court, and is scheduled for oral argument on October 8, 1991.[2] Accordingly, the in-

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[1] The court of appeals noted that while the Ninth Circuit has held (in *Escobar Ruiz* v. *INS*, 838 F.2d 1020 (1988)) that EAJA applies to INS administrative proceedings since they are similar to those governed by the Administrative Procedure Act, the other circuits that have considered the issue have concluded that EAJA extends only to administrative proceedings which—unlike those conducted by the INS—are subject to the APA. Pet. App. 7a, citing *Hodge* v. *U.S. Dep't of Justice*, 929 F.2d 153 (5th Cir. 1991), petition for cert. pending, No. 91-83; *Full Gospel Portland Church* v. *Thornburgh*, 927 F.2d 628 (D.C. Cir. 1991); *Ardestani* v. *INS*, 904 F.2d 1505 (11th Cir. 1990), cert. granted, No. 90-1141 (Mar. 4, 1991); *Clarke* v. *INS*, 904 F.2d 172 (3d Cir. 1990); and *Owens* v. *Brock*, 860 F.2d 1363 (6th Cir. 1988). The Fourth Circuit has also joined the majority view, concluding that EAJA fees are not available for work performed in INS deportation proceedings. *Escobar* v. *INS*, 935 F.2d 650 (1991).

[2] We are supplying a copy of our brief in *Ardestani* to counsel for petitioner.

stant petition should be held pending the Court's decision in *Ardestani*, and should then be disposed of in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Ardestani* v. *INS*, No. 90-1141, and thereafter disposed of as appropriate in light of that decision.

Respectfully submitted.

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